Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271
	)	
	)	

COMMENTS OF TIME WARNER INC.

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Time Warner Inc. ("Time Warner") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned docket.[1] Time Warner is the parent company of Time Warner Cable, the nation's second largest cable operator, and America Online, Inc. ("AOL"), the nation's largest Internet service provider. Time Warner Cable and AOL are leading providers of broadband services, including both facilities-based Internet access and "bring your own access" services. Time Warner thus has a vital interest in the regulatory framework governing the broadband marketplace and is ideally situated to comment on the issues raised in the *NPRM*.

INTRODUCTION AND SUMMARY

Time Warner fully supports the consumer protection goals underlying the *NPRM*, but believes that regulation is not necessary to achieve them. As the Commission has consistently found in a series of recent proceedings, broadband competition is burgeoning. There is no basis to conclude that market forces will be inadequate to ensure that broadband service providers meet consumers' needs. In the absence of any demonstrated market failure, new government

[1] *In the Matter of Consumer Protection in the Broadband Era*, Notice of Proposed Rulemaking, WC Docket No. 05-271, FCC 05-150 (rel. Sept. 23, 2005) ("*NPRM*").

mandates are clearly unnecessary to protect consumers. Indeed, such regulations could well prove counterproductive by raising service providers' costs — which in turn will be passed through to subscribers. Moreover, the uncertainty regarding the Commission's authority to impose the regulations at issue pursuant to Title I of the Communications Act argues in favor of a circumspect approach. In contrast to matters that involve public safety or national security, the regulations discussed in the *NPRM* do not warrant testing the limits of the Commission's ancillary authority.

BACKGROUND

Time Warner Cable, the nation's second largest cable operator, owns or manages cable systems serving nearly 11 million subscribers in 27 states. In addition to its basic and digital cable services, Time Warner Cable is a leading provider of broadband data and home-networking services and currently serves more than 4.5 million broadband Internet access subscribers.

AOL is the nation's largest Internet service provider, and is at the forefront of the ongoing migration from narrowband to broadband services. AOL's "bring your own access" model enables consumers to obtain transmission service from any available broadband provider and, in turn, access a wide array of content and services from AOL. For example, AOL offers innovative spam blocking, parental controls, and anti-spyware tools, as well as music downloads, streaming video, e-mail and digital photo storage, and educational services for children, among many other features.

DISCUSSION

I. The Commission's Consistent Findings That the Emerging Broadband Marketplace Is Competitive Make New Regulations Unnecessary and Counterproductive.

The Commission has often recognized the bedrock principle that prophylactic regulation is necessary only where market conditions suggest that competition will not adequately protect consumers.[2] And in the specific context of broadband Internet access services, the Commission has consistently found that burgeoning competition will deliver high-quality services, a choice of providers, a high degree of innovation, and declining prices.

Most recently, in the order accompanying the *NPRM*, the Commission relied on the existing and emerging competition among multiple broadband platforms as the basis for eliminating the monopoly-era *Computer Inquiry* rules.[3] The Commission found that, in "the emerging and rapidly changing marketplace" for broadband Internet access services, "[v]igorous competition between different platform providers already exists in many areas and is spreading to additional areas."[4] Moreover, such competition is characterized by "increasing competition at the retail level" as well as "growing competition at the wholesale level."[5] Specifically, the Commission found that not only will head-to-head competition continue to grow between cable operators and DSL providers, but "[i]ncreased intermodal and intramodal competition" will

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[2] *See, e.g.*, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 ¶ 24 (2004) ("[C]ompetition is the most effective means of ensuring that charges, practices, classifications, and regulations are just and reasonable and not unreasonably discriminatory."); Remarks of Chairman Kevin J. Martin, NARUC Summer Meeting, Austin, Texas, at 6 (July 26, 2005) (To promote innovation and to avoid stifling new service offerings, "the government must get out of the way and trust in the ability of market forces to deliver these benefits to consumers.").

[3] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150, ¶¶ 41-50 (rel. Sept. 23, 2005) ("*Wireline Broadband Order*").

[4] *Id.* at ¶¶ 47, 62.

[5] *Id.* at ¶ 50.

develop with further deployment of fiber-to-the-home and new offerings from "satellite, fixed or mobile wireless, or a yet-to-be-realized alternative."[6] In short, "[c]hanges in technology are spurring innovation," and "[c]ontinuous change and development are likely to be the hallmark of the marketplace for broadband Internet access . . . over the next several years."[7]

Earlier, the Commission had relied on such competitive dynamics in adopting its deregulatory treatment of cable modem services — which the Supreme Court upheld in *NCTA v. Brand X*.[8] The Commission likewise determined that the broadband marketplace was sufficiently competitive to relieve incumbent local exchange carriers of the obligation to offer to competitors unbundled access to newly deployed fiber-to-the-home and fiber-to-the-curb loops.[9] The Commission found that avoiding regulation of these facilities was "necessary to ensure that regulatory disincentives for broadband deployment are removed."[10]

The same market forces that prompted these deregulatory measures regarding broadband networks and services warrant regulatory restraint when it comes to proposals for new consumer protection measures. Consumer protection is vitally important, as the Commission rightly

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[6] *Id.* at ¶ 57.

[7] *Id.* at ¶¶ 50, 56.

[8] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 6 (2002), *aff'd* by *National Cable & Telecommunications Ass'n v. Brand X Internet Service,* 125 S. Ct. 2688 (2005).

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 ¶ 278 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 ¶ 2 (2004).

[10] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 ¶ 9 (2004).

recognizes. But in light of the vigorous competition that the Commission has acknowledged,[11] there is simply no reason to conclude that consumers require additional protection beyond the benefits that flow naturally from competition. Indeed, while proposals to "improve" marketplace conditions are well-intentioned, they overlook the reality that increased regulation inevitably imposes new burdens on service providers, which in turn increase the prices paid by consumers and impede the continued development of such services.

As discussed below, the goals underlying the specific areas of regulation identified in the *NPRM* all will be better served by regulatory restraint than by the adoption of new government mandates. If a broadband provider's rates, billing practices, or privacy protections raise consumers' ire, they may switch to an alternative provider. The threat of customer defections necessarily will prompt providers to heed subscribers' concerns and to refrain from engaging in unreasonable practices. As the Commission recently put it, the increasing competitive alternatives will lead to "more choices, and better terms."[12]

II. The Uncertainty Regarding the Commission's Ancillary Authority Under Title I Further Warrants Regulatory Restraint.

The uncertain extent of the Commission's statutory authority to extend Title II obligations to providers of broadband Internet access — whether facilities-based or non-facilities-based — provides an additional reason to proceed cautiously. While the Commission plainly is empowered to impose some regulations pursuant to Title I and has invoked that

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[11] *Wireline Broadband Order* at ¶ 62.

[12] *Id.* at ¶ 61.

authority in other contexts,[13] the courts have established that the Commission's ancillary jurisdiction is limited.[14]

As the Commission recognizes, to justify regulations imposed under Title I, it must demonstrate that (1) it has subject matter jurisdiction over the service to be regulated, and (2) the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities.[15] As a threshold matter, although the Commission is correct that broadband Internet access services "are unquestionably 'wire communication' . . . or . . . 'radio communication,'"[16] that does not mean that the Commission necessarily has subject matter jurisdiction to impose any type of regulation.[17] Even more significantly, it is far from clear whether the specific regulations discussed in the *NPRM* could be defended as "reasonably ancillary" to specific statutory responsibilities.[18] Such concerns, particularly in light of the

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[13] *See id.* at ¶ 108.

[14] *See American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the Commission lacked authority under Title I to impose broadcast flag regulations); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (holding that the Commission lacked authority under Title I to impose video description requirements for the benefit of visually impaired individuals).

[15] *Wireline Broadband Order* at ¶ 109 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

[16] *Id.* at ¶ 110.

[17] *Cf. American Library Ass'n*, 406 F.3d 689. The court struck down the broadcast flag regulations because the Commission's rules addressed how consumer electronic devices would operate *after* the completion of a broadcast, rather than regulating a communication by wire or radio itself. By the same logic, the Commission's subject matter jurisdiction could be called into question to the extent that the Commission were not regulating a broadband transmission service itself, but rather some attenuated aspect of the service, such as billing practices.

[18] *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) ("*Midwest Video II*") (striking down cable regulations imposed under Commission's Title I ancillary authority on the ground that rules were antithetical to the Act's basic regulatory parameters).

vigorous competition recognized by the Commission, strongly militate in favor of refraining from regulating broadband Internet access services in the absence of express statutory authority.

III. The Commission Should Refrain from Imposing the Particular Regulations Discussed in the *NPRM*.

Even apart from Time Warner's general concerns about regulating broadband Internet access services, the particular regulations on which *NPRM* seeks comment represent solutions in search of problems. The kinds of consumer harms that could potentially serve as a basis for such regulations simply do not exist. Because there is no reason to expect that any hypothesized market failures will come to pass, the Commission should refrain from needlessly imposing burdens on service providers. Far from benefiting consumers, adopting the regulations discussed in the *NPRM* would only increase the costs of broadband Internet access service.

As discussed in turn below, the Commission should reject any proposals to adopt new mandates regarding: (1) consumer proprietary network information ("CPNI"), (2) slamming, (3) truth-in-billing, (4) network outage reporting, (5) service discontinuance, or (6) rate averaging.

A. CPNI

The Commission should not extend the CPNI rules created for telecommunications carriers to providers of broadband Internet access services.[19] While the disclosure of sensitive customer information without approval is a legitimate concern, it is one that market forces and existing regulations should adequately address. The *NPRM* notes that, "[u]nder the pre-1996 Act CPNI framework . . . customer information derived from the provision of enhanced services was

[19] *NPRM* at ¶ 149.

not subject to CPNI protections."[20] Since that time, competition among information service providers has increased markedly, making governmental intervention even less appropriate today. Broadband service providers currently operate in a marketplace in which consumers expect providers to make their privacy policies available on their websites. In fact, some ISPs compete on the basis of their privacy policies, and experience has shown that ISPs that fail to protect their customers' privacy risk incurring their wrath and driving them to an alternative provider that takes privacy more seriously.

Forcing service providers to modify their privacy protections to comply with a new federal regime would undoubtedly impose significant costs, as existing support systems and procedures would require major modifications.[21] In the absence of concrete evidence of significant harm to consumers, the Commission should not impose such burdens. Even if isolated problems occur, the Commission should make every effort to find solutions that employ best practices and other voluntary measures, in light of the ever-increasing level of competition.

B. Slamming

The *NPRM* next seeks comment on whether to adopt regulations to prevent unauthorized changes in a broadband subscriber's selection of a service provider — *i.e.*, "slamming."[22] As the Commission recognizes, however, it is not clear in the broadband context whether "slamming actually could occur from a technical perspective."[23] In fact, slamming appears extremely unlikely, and in many cases impossible, in this context. Consumers who purchase broadband Internet access from a facilities-based provider such as Time Warner Cable must install specific

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[20] *Id.* at ¶ 149 n. 447 (emphasis added).

[21] For example, cable operators, including Time Warner Cable, comply with stringent customer privacy requirements under Section 631 of the Act. 47 U.S.C. § 551.

[22] *NPRM* at ¶ 151.

[23] *Id.* at ¶ 151 n. 453.

equipment and software before using the service. No entity could switch the subscriber to a competing platform without authorization, because the entity would not have access to the customer premises equipment.

Similarly, slamming is equally improbable with respect to non-facilities-based ISPs. Unlike in the context of traditional long distance services, where local exchange carriers established automated systems that enabled interexchange carriers to execute "PIC" changes, there is no reason to believe that any ISP could cause a broadband provider to change the customer's service provider of record. In order to switch to a new non-facilities-based ISP, the end user would typically, at a minimum, need to install software, establish a password, and set-up billing and payment arrangements. Indeed, AOL is not aware of *any* of its millions of customers having been slammed by a competing ISP.

The Commission plainly should not impose new regulations in the absence of any real-world concern.

C. Truth-in-Billing

The Commission also should refrain from imposing on broadband Internet access providers truth-in-billing requirements similar to those imposed on telecommunications carriers under Title II.[24] As with the protection of CPNI, the increasingly robust market forces cited in the *Wireline Broadband Order* serve as an effective deterrent to any provider that does not adopt its own customer-friendly practices. In light of such competition, the Commission should no more entertain the notion of regulating bills for broadband Internet access than it should for any on-line content service. As discussed above, it is far from clear that the Commission has

[24] *See id*. at ¶ 153.

authority to impose any kind of billing regulations when it comes to Internet-related services.[25]

Moreover, increased regulation of billing practices (including, for example, oversight over line items) can reduce providers' flexibility and ultimately make bills harder for customers to understand. While Time Warner fully supports the common-sense principle that all bills should be "clear" and "non-misleading,"[26] the subjectivity of such standards means that the imposition of new mandates inevitably would be followed by interpretive disputes and litigation. Because there is no demonstrated problem regarding the accuracy of customer bills, the costs and burdens to broadband service providers of complying with any new rules far outweigh any benefits that consumers would derive from such regulations.

D. Network Outage Reporting

The Commission also should refrain from imposing new network outage reporting obligations on broadband Internet service providers.[27] Bring-your-own-access ISPs such as AOL clearly should not be required to report on outages affecting other service providers' networks, since they lack the relevant information. And such ISPs' own backbone facilities — unlike traditional wireline telecommunications networks, where communications are routed over dedicated circuits —have built-in redundancy and automatic routing features that prevent subscribers from losing connectivity in most cases when a particular circuit goes down. Accordingly, subjecting broadband ISPs that do not operate last-mile facilities to new reporting obligations would not promote any significant governmental objective, even though such requirements surely would impose significant administrative burdens.

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[25] *See* discussion *supra* Section II.

[26] *Id.* at ¶ 152.

[27] *See id.* at ¶ 154.

Nor is there any cause for imposing new reporting obligations on facilities-based broadband providers. The Commission's rules already ensure that critical network facilities — including circuits serving "major airports, major military installations, key government facilities, nuclear power plants, or 911 facilities"[28] — are covered by its network outage reporting rules. Extending such obligations to garden-variety consumer connections is unnecessary, particularly in light of the broadband competition the Commission has identified. If a particular broadband provider experiences too many service outages, a subscriber likely would consider an alternative provider. Indeed, in the wireless marketplace, service providers compete vigorously with respect to the frequency of dropped calls, which in turn leads to increased infrastructure investment and service quality improvements. There is no reason why broadband service quality will not similarly be addressed by market forces.

Moreover, even the existing network outage requirements are widely considered overbroad by telecommunications carriers.[29] For example, telecommunications carriers have sought reconsideration of the requirement to report scheduled outages and outages that do not constitute degradation or failure of a network.[30] In any event, the Commission should focus on addressing the pending petitions for reconsideration regarding its existing rules before exploring the possibility of imposing new reporting mandates in the competitive market for broadband services.

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[28] *Id.* (citing 47 C.F.R. § 63.100(a)-(e) and *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830 (2004)).

[29] *See, e.g.*, Cingular Wireless LLC, Petition for Reconsideration, ET Docket No. 04-35 (filed Jan. 3, 2005).

[30] *See* Qwest Corporation and Qwest Communications Corporation, Petition for Reconsideration, ET Docket No. 04-35 (filed Jan. 3, 2005); AT&T, BellSouth, MCI, SBC and Verizon, Petition for Reconsideration of DS3 Simplex Reporting Requirement, ET Docket No. 04-35 (filed Dec. 23, 2004).

E. Section 214 Discontinuance

The Commission should not extend the Section 214 service-discontinuance requirements to broadband Internet access service providers.[31] Once again, the competitive conditions in the marketplace for broadband Internet access service make such monopoly-era regulations wholly unnecessary. Customers of a discontinuing provider almost invariably may purchase service from an alternative broadband service provider, and imposing exit barriers in such a marketplace does little more than pointlessly introduce inefficiencies. And the clear exclusion of information services from the text of Section 214 again calls into question the Commission's authority to extend that provision to broadband ISPs.

F. Section 254(g) Rate Averaging Requirements

The prospect of rate averaging requirements in the broadband marketplace is particularly troubling.[32] Rate regulation is perhaps the most intrusive and market-distorting form of economic regulation that the Commission has rightly sought to avoid with respect to broadband services.[33] Rules designed to compel rate averaging in different geographic markets, no less than rules that prescribe particular rates, can have severe inefficient consequences. In a competitive environment, service providers must have flexibility to tailor their rates to particular marketplace conditions. Rate averaging requirements would necessarily undermine providers' ability to respond to competition. Thus, rather than promoting affordable rates for consumers living in rural areas, rate averaging requirements might well stymie consumer-friendly promotions and delay price reductions in many areas.

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[31] *See NPRM* at ¶ 155.

[32] *See id.* at ¶ 157.

[33] *See, e.g., IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶ 36 (2004) (distinguishing "social policy" obligations from economic regulations that are suitable only for providers with market power).

Moreover, introducing a rate averaging requirement in the broadband marketplace would fly in the face of the Commission's consistent efforts to move towards cost-based pricing in the context of telecommunications services. Rate averaging necessarily introduces implicit cost subsidies by requiring the imposition of above-cost prices in some markets and below-cost prices in others. The Commission has repeatedly found that such pricing structures impede the development of efficient competition.[34] The Commission accordingly has issued numerous orders in recent years seeking to reform interstate access charges by eliminating implicit subsidies and moving toward cost-based pricing.[35] Exporting outdated and discredited telecommunications regulations to broadband Internet access services would constitute a significant policy error, even assuming the Commission has authority under Title I to do so.

[34] *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9164-65 (1997) (subsequent history omitted).

[35] *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33, ¶¶ 5-36 (rel. Mar. 3, 2005) (describing access reform proceedings).

CONCLUSION

For the foregoing reasons, the Commission should refrain from regulating broadband Internet access services. Existing and emerging competition in the market for broadband services adequately protects consumers. In the absence of demonstrated harm to consumers, the administrative burdens entailed by any consumer protection requirements clearly outweigh the putative benefits of such requirements. Moreover, the uncertainty regarding the Commission's authority to extend Title II obligations to broadband service providers make especially clear that the Commission should exercise restraint.

Respectfully submitted,

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